

**DEPARTMENT OF ENVIRONMENTAL QUALITY
TESTIMONY IN THE MATTER OF AMENDMENT OF AIR QUALITY RULES
PERTAINING TO THE AMENDMENT OF ARM 17.8.601, 604, 605, 606, 610, 612 and 614,
MINOR/CONDITIONAL OPEN BURNING
September 18, 2002**

For the record, my name is Jan Brown. I am a Rule Development Specialist in the Montana Department of Environmental Quality's Air and Waste Management Bureau. We are located in the Metcalf Building in Helena, Montana. I am here to present testimony for the Department.

The Department is requesting that the Board adopt the proposed amendments to the air quality rules to revise open burning rules related to conditional, essential agricultural, and minor source open burning.

The rulemaking project began several years ago, when some of the regulated community requested that we consider some changes to the existing rules. The proposed amendments revise the time periods, materials and criteria applicable to conditional open burning. They include suggestions that were made by local health departments in Missoula, Lewis and Clark and other counties. The proposed revisions were sent to the counties for their review.

The current rule allows prescribed wildland open burning, firefighter training open burning, emergency open burning, and essential agricultural open burning to take place under certain conditions throughout the entire year. Conditional open burners, landfills and trade wastes and other minor open burners are prohibited from burning during the winter season. Some of the burning that is allowed, such as prescribed wildland and agricultural, are larger burns and have greater impacts than the burns that are prohibited.

The proposed amendments would allow any type of minor open burning of non-prohibited materials to take place during periods of good ventilation throughout the entire year, including the winter months of December through February. This is accomplished by adding the following categories to ARM 17.8.605:

- (1) conditional air quality open burning, which includes landfills and trade wastes;
- (2) commercial film production open burning;
- (3) Christmas tree waste open burning; and
- (4) any other minor open burning not prohibited by ARM 17.8.604.

Burns located outside of the Eastern Montana Open Burning Zone would be subject to Department review and would require prior approval from the Department. Those burning inside the Eastern Montana Open Burning Zone would still be required to notify the Department prior to burning, but would not be getting specific Department approval for the burning. The reason for allowing it in that area is basically due to topographical and meteorological conditions in eastern Montana.

The intent of the changes is to allow the Department flexibility to approve valid burning requests that can be accomplished outside the normal burning seasons that will not adversely affect air quality.

Current air quality open burning rules may also be in conflict in some areas with solid waste rules that regulate open burning conducted at licensed landfills. The proposed amendments make the air quality rules consistent with state and federal solid waste rules that regulate such burning.

Current rules also allow landfill open burning permits to be valid for only 30 days after the permit is issued and for a single burn. Often such burns cannot be completed during the time the permit is valid, due to meteorological conditions. The proposed amendments would increase the time these permits are valid to one year after the permit is issued, and would require that the burn piles at the landfills are to be inspected by the Department or its designated representative prior to every burn. That is mainly to determine whether or not there are prohibited materials in the piles.

The proposed rule also would clarify language in ARM 17.8.604, which describes materials that are prohibited from being disposed of by open burning, and to add "paint" to the prohibited materials list. There are some minor editorial and grammatical changes proposed that do not change the meaning of the rule but make it more readable.

In response to comments by the Environmental Protection Agency (EPA), Region 8, the Department is proposing to make the following changes to the initial MAR notice:

In order to clarify the types of open burning to which the BACT requirements apply, ARM 17.8.601(1)(b) and (c) would be revised to add "commercial film production open burning" and "Christmas tree waste open burning"; and "any other minor open burning" would be changed to "minor open burning." The revised language follows:

17.8.601 DEFINITIONS (1)(b) For essential agricultural open burning, ~~or~~ prescribed wildland open burning, conditional air quality open burning, commercial film production open burning, Christmas tree waste open burning, or minor open burning during September, October, or November, BACT includes burning only during the time periods specified by the department, which may be determined by calling the department at (800)225-6779.

17.8.601(1)(c) For essential agricultural open burning, prescribed wildland open burning, conditional air quality open burning, commercial film production open burning, Christmas tree waste open burning, or minor open burning during December, January, or February, BACT includes burning only during the time periods specified by the department, which may be determined by calling the department at (800)225-6779.

In order to clarify activities excluded from the definition of "open burning," the wording of the Department's proposal to exclude "combustion of ordnance" from the open burning definition in 17.8.601(7) would be changed to "detonation of unexploded ordnance." The rule would read as follows:

17.8.601(7) "Open burning" means combustion of any material directly in the open air without a receptacle, or in a receptacle other than a furnace, multiple chambered incinerator, or wood waste burner, with the exception of detonation of unexploded ordnance, small recreational fires, construction site heating devices used to warm workers, or safety flares used to combust or dispose of hazardous or toxic gases at industrial facilities, such as refineries, gas sweetening plants, oil and gas wells, sulfur recovery plants or elemental phosphorus plants.

In the proposed revisions to ARM 17.8.605 SPECIAL BURNING PERIODS, the words "or that is allowed by ARM 17.8.606" would be added. The rule would read as follows: 17.8.605(h) any minor open burning that is not prohibited by ARM 17.8.604 or that is allowed by ARM 17.8.606. This language will emphasize that even though minor open burning will be allowed under certain circumstances throughout the entire year, sources still must comply with the requirements in ARM 17.8.606.

EPA also comments that the department must make a demonstration that allowing open burning to take place in periods of the year when some open burning is currently prohibited will not interfere with attainment of ambient standards. Allowing open burning to take place during periods when it is currently prohibited does not increase the total amount of burning that takes place. The burning that is going to take place is merely spread throughout the year. This reduces emissions during the fall and spring. Allowing minor open burning to occur under certain conditions during the winter months will not endanger ambient air quality standards since the burning will only be allowed at times and in places where the ventilation is sufficient.

Finally EPA comments that they cannot allow rules that grant the department authority to make case-by-case determinations as to when to allow open burning of material moved from the point of generation. The department does not believe that allowing the department to make permitting decisions constitutes unlawful revision of the State Implementation Plan, and adamantly disagrees with the contention that the department cannot use discretion in implementing its program if authorized by the Board of Environmental Review.

David Rusoff, DEQ staff attorney, has prepared for the Board a HB 521 review, comparing stringency of state and local rules to any comparable federal regulations, and a HB 311 review, assessing impact on private property.

In regard to the HB 521 review, the proposed amendments would not make the State rules more stringent than comparable federal regulations or guidelines. Therefore, no further HB 521 analysis is required.

In regard to the HB 311 review, the present proposed action involves rules affecting use of private real property for operation of air pollutant sources, and the Board has discretion legally not to take the action. Therefore, the Private Property Assessment Act applies to this proposed rulemaking and completion of an Attorney General's Private Property Assessment Act Checklist is required. This checklist was completed. Based upon completion of the checklist, the proposed rulemaking does not have taking or damaging implications and no further HB 311 assessment is required.

In addition to the MAR notice, the proposed rule changes were publicly noticed in five daily newspapers in Montana and were mailed to the Department's interested parties list and to the Air Pollution Control Advisory Council.

The Department recommends the Board's adoption of the amendments to the air quality rules as proposed in the Montana Administrative Register.